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ONE HUNDRED ELEVENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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May 20, 2010

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The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20515

Dear Chairman Genachowski:

On March 26, 2010 the International Bureau, Wireless Telecommunications Bureau, and Office of Engineering and Technology (the Bureaus) approved the transfer of control of certain licenses from SkyTerra Communications (SkyTerra) to Harbinger Capital Partners Funds (Harbinger). The Bureaus conditioned approval on adherence to a number of "commitments" made by Harbinger.

Pursuant to House Rule X, clause 2(b), the Oversight and Government Reform Committee has jurisdiction to "review and study ... the organization and operation of Federal agencies and entities having responsibilities for the administration and execution of laws and programs addressing subjects within its jurisdiction." We are writing to request an explanation of the genesis of those commitments, and the process adopted by the Bureaus in considering such commitments and approving the transfer of control of the licenses.

The Bureaus placed the application on Public Notice on May 1, 2009. The Department of Justice, Federal Bureau of Investigation, and Department of Homeland Security (the agencies) collectively filed a letter on June 2, 2009, requesting that the Commission's review of the application be delayed until the agencies could review the national security implications of the transaction. On December 8, 2009, the agencies withdrew their request. No other submissions, either in favor of or opposed to the transaction, were filed in this proceeding.

Nonetheless, the Bureaus adopted, as a requirement of their approval of the transfer of control, certain conditions proposed by Harbinger in a submission filed with the Commission the same day as the Bureau's approval of the transfer of control of the licenses. It is our understanding that Harbinger's submission was not made public before the Bureaus approved the

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transaction, and that, as a result, the Commission neither sought nor received any comment on Harbinger's submission prior to approval of the transaction.

Two of the conditions involve SkyTerra's ability to make its spectrum and network available to the "largest or second largest wireless provider." These conditions would inhibit the ability of such providers to utilize SkyTerra's spectrum and network without the Commission's prior approval, thereby inhibiting these providers (and only these providers) from meeting the spectrum needs of their customers.

We are puzzled by the process adopted by the Commission in this proceeding, and, in particular, in the adoption of the conditions imposed. To help us understand the legal basis upon which the Bureaus approved this transaction and imposed these conditions, please provide answers to the following questions by May 14, 2010:

1a. The Bureaus imposed conditions that were unrelated to the concerns expressed by the agencies. Thus, no entities filed comments with the Commission in the SkyTerra proceeding that served as the basis for the Bureaus' conditions. If these conditions were not based upon the record in the proceeding, upon what factual information were these conditioned based?

1b. Please provide the Committee with copies of all reports, studies, or other documents, both external and internal, upon which the Bureaus based their conclusion that the conditions addressed a specific problem created by the transfer of control of the licenses, as well as the manner in which the conditions remedy that problem.

2. Please provide citations to the Commission's statutory and administrative authority that permit the Bureaus to impose conditions to address perceived problems that were not identified in the record in a proceeding.

3a. Please provide citations to the Commission's statutory and administrative authority that permit the Bureaus to require conditions in a license transfer proceeding that impose restrictions on entities that are not parties to either the transaction or the proceeding.

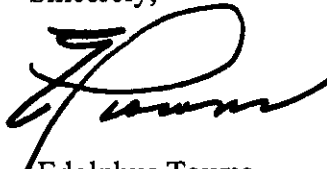
3b. Please provide Commission precedent in which the Bureaus have required conditions in a license transfer proceeding that impose restrictions on entities that are not parties to either the transaction or the proceeding.

4. Please provide citations to the Commission's statutory and administrative authority that permit the Commission to adopt conditions in a license transfer proceeding that restrict a third party's rights without first providing such entities impacted by the conditions with the opportunity for notice and comment.

5. Please provide citations to the Commission's statutory and administrative authority that permit the Bureaus to adopt the SkyTerra Order and impose the conditions in such order under delegated authority.

We appreciate your response to our questions and look forward to reviewing them.

Sincerely,



Edolphus Towns  
Chairman

cc:

The Honorable Darrell Issa  
Ranking Minority Member  
Committee on Oversight and Government Reform

The Honorable Michael J. Copps  
Commissioner  
Federal Communications Commission

The Honorable Robert M. McDowell  
Commissioner  
Federal Communications Commission

The Honorable Mignon Clyburn  
Commissioner  
Federal Communications Commission

The Honorable Meredith Attwell Baker  
Commissioner  
Federal Communications Commission



OFFICE OF  
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

September 1, 2010

The Honorable Edolphus Towns  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Towns:

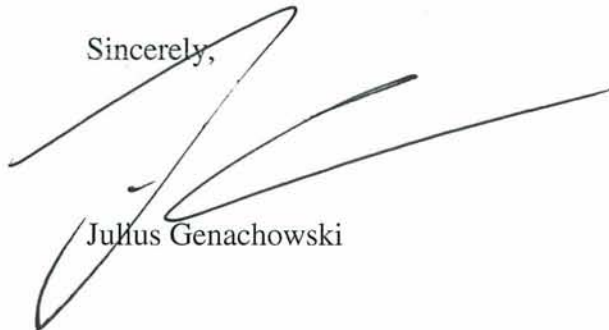
Thank you for your letter concerning the Commission's license transfer review process in the SkyTerra Communications, Inc. – Harbinger Capital Partners Funds matter. You requested that I provide answers to a series of questions related to the *Order* issued on March 26, 2010.

I appreciate knowing of the Committee on Oversight and Reform's high level of interest in this particular transfer proceeding. Petitions for reconsideration and oppositions currently are pending before the Bureaus that issued the *Order*. They are reviewing all of the filings and assessing the appropriate action to resolve the legal arguments presented. Since this matter is an ongoing adjudicatory proceeding, the Commission is limited in its ability to respond to questions that are central to the final outcome of that proceeding. Your letter will be included in the proceeding's record and my staff will provide yours with an update once a decision on the reconsideration is issued.

I have attached a statement from the FCC's Office of General Counsel that provides the relevant case background, as well as the statutory citations, precedents and internal guidelines related to the Commission's obligation to impose transfer conditions. I believe this information will provide you with the core material necessary to assist in a review of the legal basis for the Commission's transfer process in this case.

I look forward to further assisting your committee as you review the Commission's process and procedures related to this matter.

Sincerely,



Julius Genachowski

Enclosure

**Federal Communications Commission**  
**Office of General Counsel**  
**Response to the Committee on Oversight and Government Reform**  
**SkyTerra Communications, Inc. Transfer of Licenses to Harbinger Capital Partners Funds**

Background on *Order* and Conditions:

The Chiefs of the Commission's International Bureau, Office of Engineering and Technology, and Wireless Telecommunications Bureau approved the SkyTerra license transfers in an *Order* released March 26, 2010, subject to Harbinger's adherence to certain voluntary commitments it made regarding the construction and operation of a proposed integrated satellite/terrestrial "fourth-generation" mobile broadband network. As part of those commitments, Harbinger is required to obtain prior Commission approval before entering into certain business arrangements with whatever companies are the largest and second largest wireless providers at the time of the arrangement. The *Order* does not prohibit any arrangements *ex ante*, nor does it impose any requirements on companies other than Harbinger, SkyTerra, and their affiliates.

Case Record Materials:

The reasons for Commission actions are set forth fully in its decisions. The record that the Commission considers includes not only comments by third parties, if any, but the applicants' applications and any supplementary material they may provide, either of their own accord or in response to requests by Commission staff. It may also include, in appropriate cases, information developed by the Commission or information already in the Commission's records (for example, ownership information or information regarding market share). Although many of the documents in the record in this particular case (IB Docket No. 08-184) contain confidential business information, the full public record is available on the Commission's Electronic Comment Filing System (ECFS), <http://fjallfoss.fcc.gov/ecfs/>. Much of the public record in this case also is available on the web site of the FCC's Transaction Team <http://www.fcc.gov/transaction/harbinger-skyterra.html>.

Case Status:

AT&T, Inc., and Verizon Wireless, which currently are the two largest nationwide wireless providers, filed petitions for reconsideration of the *Order*. Oppositions to the petitions were filed by Sprint Nextel Corporation and The Public Interest Spectrum Coalition, an informal group consisting of the Media Access Project and other public interest groups. The petitions currently are pending before the Bureaus that issued the *Order*, and they are reviewing all of the filings and assessing the appropriate action to take to resolve the legal arguments presented on reconsideration.

Authority to Impose Conditions

The Commission is charged by Congress to determine whether an assignment or transfer of control of a license or authorization serves the public interest. *See* 47 U.S.C. §§ 214, 310. It takes this obligation seriously, and therefore carefully reviews all assignment and transfer

applications, performing an independent analysis and seeking more information from the applicants or other parties where necessary. The courts also have made clear that the Commission has an affirmative obligation to determine whether the issuance or transfer of a license serves the public interest, and that it therefore may not rest simply on deciding whatever issues (if any) may have been raised by the applicants or third parties. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981). The Commission's public interest authority enables it, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction. *See* 47 U.S.C. §§ 214, 303(r).

The Commission has in the past imposed conditions to address concerns arising out of its own public interest analysis, to ensure that the approval of the application serves the public interest. *See, e.g., Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order, 23 FCC Rcd 17570, 17612 ¶ 108, 17614 ¶ 112 (2008); *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings, LLC*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17533 ¶ 201 (2008)

#### Authority to Impose Conditions on Third Parties

To our knowledge, in approving a transaction, the Commission has never imposed conditions on entities other than the parties to the transaction (or their affiliates), and the Bureaus did not do so here. Third-parties sometimes are affected by conditions placed on the applicants. Indeed, “most every agency action has relatively immediate effects for parties beyond those directly subject to regulation.” *National Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 666 (D.C. Cir. 2009). In this case, the *Order* states that the conditions “apply to the Applicants SkyTerra Communications, Inc. and Harbinger Capital Partners Funds, to their successors and assigns, and to any affiliate of SkyTerra Communications, Inc.” *Order*, App. B, Att. 2. Likewise, the *Order* indicates that only the merged entity is subject to forfeiture or enforcement action if the conditions are violated. *Id.* Further, the conditions “neither require nor prohibit any action” by AT&T and Verizon. *See National Cable & Telecomms. Ass’n v. FCC*, 567 F.3d at 666 (D.C. Cir. 2009). Given these provisions, we do not believe the *Order* imposes restrictions on any entity other than Harbinger, SkyTerra, and their affiliates.

#### Authority to Impose Conditions Absent Third-Party Comments

Because this issue has been raised by AT&T and Verizon Wireless in their petitions for reconsideration, we cannot specifically address the Commission's ability to adopt conditions that affect third-parties without those parties having had an opportunity to comment. Please note, however, that this question, along with all of the other claims of AT&T and Verizon Wireless, currently are being considered by the Bureaus after an opportunity for public comment.

#### Authority of Bureaus to Issue Orders

Bureaus may act on transfer and assignment applications that do not present novel questions of fact, law or policy and that can be resolved under existing precedents and guidelines. *See* 47 C.F.R. § 0.261; *see also* 47 U.S.C. § 155(c).